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**CONFIDENTIALITY AND CLAIMS OF
INEFFECTIVE ASSISTANCE**

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Confidentiality and Claims of Ineffective Assistance

BY PETER A. JOY AND KEVIN C. McMUNIGAL

Almost every defense lawyer eventually faces an ineffective assistance of counsel claim from a former client. A common reaction is to be defensive and view the former client as an adversary. Usually, a prosecutor or another government lawyer will contact the defense lawyer to discuss the allegation and attempt to refute the claim. In this context, the defense attorney may consider the prosecutor an ally defending the lawyer's work. But is cooperation by the defense lawyer permitted? If so, how much? May the lawyer turn over the former client's file? Has the client lost the protections afforded by confidentiality and attorney-client privilege by asserting the ineffective assistance of counsel claim? The ABA Standing Committee on Ethics and Professional Responsibility recently addressed these and other questions in Formal Opinion 10-456, available at <http://www.abanet.org/cpr/10-456.pdf>.

The committee explained that by bringing the claim the client ordinarily waives the attorney-client privilege to some communications, but confidential information is still protected by Model Rule 1.6 unless the client gives informed consent to the disclosure or an exception to Rule 1.6 applies. One exception, found in Rule 1.6(b) (5), states that the lawyer may disclose confidential information if the lawyer "reasonably believes [disclosure] is necessary" for the lawyer's self-defense. The committee cautioned that even if the lawyer reasonably believes that there is need to disclose client information to prevent harm to the lawyer through a finding of ineffective assistance of counsel, "it is highly unlikely that a disclosure

in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable."

By insisting on court supervision of the defense lawyer's disclosure of information to the prosecution, Formal Opinion 10-456 mandates that the defense lawyer be more protective of client information than Comment 10 to Rule 1.6 requires. Comment 10 states that when there is an allegation involving the lawyer's conduct or representation of a former client, the self-defense exception "does not require the lawyer to await the commencement of an action or proceeding" to respond. In our opinion, the requirement of court supervision of the defense lawyer's disclosure of information to the prosecution is something that many defense lawyers and prosecutors, especially in state courts, will find is contrary to their current practice.

What the defense attorney may disclose, when the attorney may disclose, and under what circumstances are important. A defense lawyer needs to know what to do when the government attorney responding to the ineffective assistance claim requests an interview and seeks access to the client's file. It is also important for the defense lawyer to understand the ethical balance between protecting a former client's rights of confidentiality and the lawyer's interest in avoiding an ineffective assistance of counsel determination by the court.

In this column, we review the key features of the opinion and discuss what a defense lawyer should do when called upon to reveal client information in response to an ineffective assistance of counsel claim. We begin by discussing the scope of the confidentiality obligation and how client confidentiality and attorney-client privilege apply in such matters.

Confidentiality, Attorney-Client Privilege

The committee emphasized the importance of the lawyer's duty to keep client information confidential as the primary basis for its conclusion that the defense lawyer may not disclose any information relating to client representation without court supervision. The committee also discussed the relationship between confidentiality and attorney-client privilege, which is essential to understanding the committee's rationale.

Confidentiality is a cornerstone of legal ethics. Model Rule 1.6 states that "[a] lawyer shall not reveal information relating to the representation of a client" unless the client consents or an exception applies. Comment 3 emphasizes the broad scope



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of confidentiality explaining that it "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Confidentiality bars the lawyer from revealing information about a client representation, and Model Rule 1.8(b) additionally prohibits the lawyer from using the information to the client's disadvantage, no matter the source of the information unless the client gives informed consent or an exception exists.

In contrast to confidentiality, which is found in a jurisdiction's ethics rules, the attorney-client privilege is found in a jurisdiction's evidence law. Though the two are often confused, attorney-client privilege is actually much narrower than confidentiality and protects only communications between defense counsel and client made in confidence for the purpose of seeking, obtaining, or providing legal assistance to the client. Attorney-client privilege protects attorney-client communications from forced revelation, such as at a trial, hearing, or deposition. The authority to waive attorney-client privilege belongs to the client and not the lawyer.

Relying on the importance of confidentiality and attorney-client privilege, the committee concluded that if a government lawyer defending against an ineffective assistance of counsel claim contacts the defense lawyer, the lawyer should not provide any information until required to do so at a court hearing.

Duty to Assert Privilege and Confidentiality

The opinion states that to permit defense counsel to disclose information outside the context of a formal proceeding would deny the former client the opportunity to object to the disclosure. Even if the court found that by asserting ineffective assistance of counsel the client had waived attorney-client privilege, requiring court supervision of the disclosure would provide the client with the opportunity to argue that some of the information the prosecution might seek to present is not relevant. In addition, the client could also argue whether some information is beyond the scope of the attorney-client privilege waiver. Without court supervision, the committee observed that disclosure of client information might be more expansive than necessary for the purpose of defending against a claim of ineffective assistance.

When contacted by the prosecution to discuss the ineffective assistance claim, the opinion maintains that the defense lawyer has a duty to protect attorney-client privilege and confidentiality. The

lawyer's duty to assert attorney-client privilege is found in the ethics rules.

Comment 13 to Model Rule 1.6 states that "the lawyer should assert on behalf of the client all nonfrivolous claims that . . . the information sought is protected against disclosure by attorney-client privilege or other applicable law."

A prior ethics opinion, Formal Op. 94-385, states that the obligation to assert attorney-client privilege applies to former as well as current clients, and the current opinion, Formal Opinion 10-456, affirms that position. The current opinion identifies several state advisory ethics opinions that have reached the same conclusion. (*See, e.g.*, Connecticut Bar Ass'n Ethics Op. 99-38 (stating that, absent client waiver, a subpoenaed lawyer must assert attorney-client privilege); South Carolina Bar Ethics Advisory Committee Adv. Op. 98-30 (holding that lawyer must assert attorney-client privilege and may only disclose information by court order); Utah State Bar Ethics Advisory Committee Op. 05-01 (notwithstanding prosecutor's subpoena, lawyer may not reveal attorney-client information to prosecution or in court without court order).)

Self-Defense Exception

In reaching its conclusion, the committee considered whether the defense lawyer may make out-of-court disclosures under the self-defense exception of Rule 1.6(b)(5). The "self-defense exception" of Rule 1.6(b)(5) states in pertinent part, "A lawyer may reveal information relating to the representation of a client to the extent that the lawyer reasonably believes necessary . . . to respond to allegations in any proceeding concerning the representation of the client." The committee observed that the self-defense exception is premised on fairness, and without such an exception a lawyer accused of wrongdoing would be defenseless against false claims.

The committee acknowledged that an allegation of ineffective assistance of counsel fits the final clause of the self-defense exception, which permits disclosure of client information to respond to allegations concerning the lawyer's representation of the client. The committee stated that this exception is usually used to permit a lawyer to "disclose otherwise protected information to defend against disciplinary proceedings or sanctions and disqualification motions in litigation." The committee stated that this exception appears to apply to allegations of ineffective assistance of counsel "because

the proceeding includes an allegation concerning the lawyer's representation of the client to which the lawyer might wish to respond."

If a defense lawyer believes that the ineffective assistance of counsel allegation triggers an exception to confidentiality, the committee observed that Comment 14 "cautions lawyers to take steps to limit 'access to information to the tribunal or other persons having a need to know it' and to seek 'appropriate protective orders or other arrangements . . . to the fullest extent possible.'" The committee explained that under the self-defense exception, the lawyer must limit disclosure of information relating to the representation of the client only to what is necessary to respond to the ineffective assistance of counsel claim.

Court-Supervised Disclosure Required

When a defense lawyer determines that disclosure of some confidential information is reasonably necessary and permitted under the self-defense exception, the committee concluded that disclosure of information to the prosecution prior to a court-supervised response will unlikely be justified. The committee observed that many ineffective assistance of counsel claims are dismissed on legal and not factual grounds before the lawyer would be called upon to testify, and the lawyer's self-defense interests are protected without the need for ex parte communication with the prosecution. If testimony is required, the defense lawyer is still able to provide it, and the court will be able to determine whether and when privilege or relevance should limit the disclosure.

By prohibiting discussions of the client representation with the prosecution prior to a court-supervised response, the committee's decision may produce unintended consequences. For example, in some instances the prosecutor will not be able to determine if there is a basis to concede an ineffective assistance of counsel claim prior to the hearing since the prosecutor must wait for the hearing to discuss the case with the defense lawyer. Nor will the prosecutor be able to prepare fully for the hearing, and as a result the time necessary to hold the hearing will likely be longer or the hearing may have to be continued if the prosecutor discovers information that requires additional time to develop for presentation to the court. It is also possible that some defendants may prevail on ineffective assistance claims and be retried because prosecutors defending the claims lacked prior access to information from defense counsel.

While the committee acknowledged some of

these possible results, it determined that there was no evidence that resolution of ineffective assistance of counsel claims are prejudiced when prosecutors do not receive client information from defense lawyers outside of hearings. The committee did not discuss the basis for this finding, so anyone reading the opinion must speculate on the basis for this finding. Is it based on the relatively low success rate of ineffective assistance of counsel claims? Is there some other basis? In our opinion, this is a weakness in the opinion.

The committee also presumed lack of prejudice to the defense counsel by requiring disclosure under court supervision without fully exploring the lawyer's interests at stake. A defense lawyer has reputational interests at stake, and also may face negative professional and financial consequences if there is a finding of ineffective assistance of counsel. A court finding of ineffective assistance of counsel is the equivalent of finding less than competent representation by the defense lawyer. Although professional discipline for violating the Model Rule 1.1 duty of competence is rare for defense lawyers, it is possible. It is also possible that subsequent to a finding of ineffective assistance of counsel the defendant may not be reconvicted, and the former client could then bring a legal malpractice action against the lawyer. We believe the opinion should have explored these interests of defense counsel more fully.

Formal Opinion 10-456 provides needed guidance concerning the defense attorney's confidentiality duty when a former client brings an ineffective assistance of counsel claim. While the opinion states that common practice today is not to disclose client confidences to the prosecution outside of court-supervised proceedings, this practice is not uniform and thus the opinion will be of interest to defense lawyers, prosecutors, and judges. The opinion places great emphasis on the importance of client confidentiality, and in doing so calculates that there is little harm to prosecutors defending ineffective assistance of counsel claims and defense lawyers when disclosure occurs only with court supervision. While the standing committee's reasoning that court supervision limits the risk that defense counsel would disclose more than necessary and unsupervised disclosure to the prosecution might lead to information that could prejudice the defendant in the event of a retrial appears sound, we believe that the opinion should have more carefully considered the competing interests of the prosecution and the defense. ■